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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 354.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor.

CAROLINE R. KUEHNER and FREDERICK G. FISCHER, as trustees,
Petitioners,

GRAYSON M.-P. MURPHY, *et al.*, as a Preferred Stockholders Protective Committee, *et al.*,
Respondents.

PETITIONERS' REPLY BRIEF.

ROLLIN BROWNE,
RALPH MONTGOMERY ARKUSH,
HENRY L. GLENN,
Counsel for Petitioners.

MITCHELL, TAYLOR, CAPRON & MARSH,
Of Counsel.

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ON PETITION FOR WRIT OF CERTIORARI.

PETITIONERS' REPLY BRIEF.

I.

The trustee's answering brief contains the astonishing argument that petitioners have no standing to challenge the constitutionality of the limitation provision because they "have accepted the benefit of the statutory scheme of liquidation".

In *Calhoun* v. *Massie,* 253 U. S. 170, cited by the trustee, the person estopped from attacking the statute in question had actually accepted a payment of money

from the Federal Government, to no part of which would he have been entitled but for the enactment of the statute. *Shepherd* v. *Mt. Vernon Trust Co.*, 269 N. Y. 234, also cited by the trustee, simply held that bank depositors could not withdraw, pursuant to the terms of a reorganization plan adopted and confirmed under a New York statute, a portion of the deposits due them by an insolvent bank, and *afterwards* sue the bank for the balance of their deposits on the ground that the statute pursuant to which the bank was reorganized was unconstitutional.

In the case at bar the petitioners, long prior to the confirmation of a plan of reorganization (one has not even yet been formally proposed) and at the very inception of the proceeding brought by the trustee for the purpose of determining whether the petitioners' claim should be allowed, even in the amount of three years' rent (see Main Brief, pp. 3-4), urged that their entire claim was provable and that, if any part were not provable, it should be reserved as a charge against the assets, and challenged the constitutionality of the limitation provision if construed so as to limit their participation to three years' rent. The petitioners could have done nothing more.

The Special Master refused to pass on the constitutionality of the provision, but the District Court and the Court of Appeals held it constitutional as so construed.

The petitioners have as yet accepted nothing. The trustee's argument thus boils down to the contention that petitioners' inability to appeal from the portion of the order of the District Court partially allowing their claim to the extent of three years' rent constitutes an acceptance of a benefit which now bars them from raising the question of the validity of the

statute, though that question was duly raised before the claim was held to be allowable in any amount.

II.

The trustee argues that the petitioners cannot show at the present time that they are in immediate danger of direct injury because it will not be known until the end of the term whether the amount of three years' rent is equal to or less than the petitioners' actual loss. It is sufficiently shown in the petitioners' main brief that they are in immediate danger of direct injury because by the operation of the limitation provision and the discharge provisions of subdivision (h) of Section 77B, they will be deprived of a present contract right of indemnity. No method of presently evaluating in dollars and cents that contract of indemnity is available to the petitioners, other than the one universally accepted for evaluating landlords' claims (see Our Main Brief, p. 19). But even if the trustee's contention were sound,—that the question of constitutionality cannot be litigated until the amount of the petitioners' actual loss is known, the order entered in the present proceedings clearly should be without prejudice to the petitioners' right to attack the statute at the end of the term. Consequently, in any event, the petition for certiorari should be granted so that the order of the court below may be corrected in this respect.

Respectfully submitted,

ROLLIN BROWNE,
RALPH MONTGOMERY ARKUSH,
HENRY L. GLENN,
Counsel for Petitioners.

MITCHELL, TAYLOR, CAPRON & MARSH,
Of Counsel.